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IN THE
Supreme Court of the United States

DAVID A. ZUBIK, ET AL., *Petitioners*

v.

SYLVIA BURWELL, ET AL., *Respondents*

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and District of Columbia Circuits

BRIEF OF *AMICI CURIAE* 207 MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are 207 Members of Congress, representing both political parties, who share a strong interest in upholding Congress's long, bipartisan tradition of protecting religious liberty. They are in a unique position to explain the role of the Religious Freedom Restoration Act of 1993 ("RFRA"), and other federal laws, in codifying and vindicating that tradition.

Amici are:

United States Senators

Orrin G. Hatch (R-UT)	James Lankford (R-OK)
Lamar Alexander (R-TN)	Charles Grassley (R-IA)
John Barrasso (R-WY)	John Hoeven (R-ND)
Roy Blunt (R-MO)	James M. Inhofe (R-OK)
John Boozman (R-AR)	Mike Lee (R-UT)
Daniel R. Coats (R-IN)	John McCain (R-AZ)
Thad Cochran (R-MS)	Jerry Moran (R-KS)

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have been lodged with the Clerk or accompany this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

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Pat Roberts (R-KS)

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Roger Wicker (R-MS)

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Paul D. Ryan (R-WI)

Majority Leader
Kevin McCarthy (R-CA)

Majority Whip
Steve Scalise (R-LA)

Diane Black (R-TN)

Mike Kelly (R-PA)

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Joseph Pitts (R-PA)

Carlos Curbelo (R-FL)

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Mario Diaz-Balart (R-FL)

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SUMMARY OF ARGUMENT

Congress has a long and uninterrupted tradition of enacting statutory protections of religious liberties. These statutory protections rest on a fundamental principle: Courts and government officials have no business questioning or second-guessing the validity of sincerely-held religious beliefs.

That principle is reflected in the Religious Freedom Restoration Act ("RFRA"), which was enacted with virtually universal support from across the political and ideological spectrum. Consistent with its tradition of protecting religious liberty, Congress intentionally drafted the statute to have broad and sweeping effect. RFRA applies to all later-enacted laws unless those laws explicitly exclude RFRA's application—something Congress has *never* seen fit to do. It is also broad substantively. It protects all sincerely held beliefs—regardless of whether individual government officials agree with them—and protects all asserting those beliefs, including churches, religious non-profits, and all other individuals and entities.

The Government's defense of its so-called "accommodation" for religious non-profits—an "accommodation" that requires petitioners to take an action they believe to be morally wrong—cannot satisfy the strict demands of RFRA. In questioning petitioners' assertion that the conduct compelled by HHS is morally wrong, the Government ignores the repeated commands of this Court. In considering religious liberty claims under RFRA, courts may not

assess the "logic," "consistency," "truth," "verity," or "reasonableness" of the beliefs at issue. As long as those beliefs are sincere—and the Government does not question the sincerity of the petitioners' beliefs here—courts must give deference to those beliefs unless the government-imposed substantial burden on those beliefs (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.

The Government's argument here hinges on questioning the logic and reasonableness of the religious beliefs of the nuns and other religious organizations who brought the cases below. Under RFRA, however, courts may not undertake this inquiry. This Court's decisions make clear that a burden on religious belief is "substantial" when government regulations place "substantial pressure" on the religious organization to violate its sincerely held beliefs, without regard to whether the belief itself is deemed to be minor or "insubstantial."

The Affordable Care Act does nothing to change this conclusion. The ACA did not override RFRA. Indeed, even the ACA—which many of the *amici* voted against and oppose—did not countenance the infringement on petitioners' religious liberties in which the Secretary of Health and Human Services has engaged. Despite RFRA's command that the religious beliefs of all individuals and organizations be accorded the same deference, HHS has given the religious liberties of religious non-profits second-tier status.

For these reasons, RFRA requires that the petitioners, all of which are religious non-profits, be exempted from engaging in conduct they sincerely believe would be morally wrong and would violate the tenets of their faith.

ARGUMENT

I. Religious Freedom Is a Fundamental Guarantee of the United States Constitution And Is Routinely Recognized in Federal Law.

Religious freedom is a fundamental guarantee of the U.S. Constitution, and its place as the first and foremost protection in the First Amendment is no accident: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. CONST. amend. I.

Throughout American history, prominent Members of Congress have been outspoken in support of strong protections for religious liberty. Commemorating the 200th anniversary of the Pilgrims' landing in Massachusetts, Daniel Webster said:

> Of the motives which influenced the first settlers to a voluntary exile, and to seek an asylum in this then unexplored wilderness, the first and principal, no doubt, were connected with religion. They sought to enjoy a higher degree of religious freedom, and what they esteemed a purer form of religious worship, than was allowed to their

> choice, in the Old World. The love of religious liberty is a stronger sentiment, when fully excited, than an attachment to civil or political freedom. That freedom which the conscience demands, and which men feel bound by their hope of salvation to contend for, can hardly fail to be attained.

Oration before the Pilgrim Society at Plymouth, Massachusetts (Dec. 22, 1820). Almost twenty-five years later, Abraham Lincoln (a future House Member as well as President) proposed the following resolution during a wave of anti-Catholic riots:

> Resolved, That the guarantee of the rights of conscience, as found in our Constitution, is most sacred and inviolable and that all attempts to abridge or interfere with these rights, either of Catholic or Protestant, directly or indirectly, have our decided disapprobation, and shall ever have our most effective opposition.

Resolution proposed by Abraham Lincoln to a meeting of the Whig Party in Springfield, Illinois (June 12, 1844). Over a century later, these sentiments were echoed by Senator Edward Kennedy:

> The brave pioneers who founded America came here in large part to escape religious tyranny and to practice their faiths free from government interference. The persecution they had

> suffered in the old world convinced them of the need to assure for all Americans for all time the right to practice their religion unencumbered by the yoke of religious tyranny.

The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102nd Cong., 2d Sess., at 1 (1992).

The importance of these guarantees is exemplified by Congress's long bipartisan tradition of providing individuals and groups (including non-profit religious organizations) broad exemptions from otherwise generally applicable laws when it could foresee that the laws would impinge on the free exercise of religion. *See* 50 U.S.C. app. § 456(j) (military service); 8 U.S.C. § 1182(g)(2)(C) (vaccination requirements); 18 U.S.C. § 3597(b) (participation in federal executions for capital crimes).[2]

The congressional solicitude for sincerely held religious beliefs extends specifically to health care. Congress has long recognized exemptions for those participating in federal health programs, including exemptions for those asserting religious objections to actions promoting abortion, sterilization, contraception, or other similar procedures. For

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[2] Additional examples include accommodations allowing: religious individuals to wear "an item of religious apparel" while wearing an active military uniform, 10 U.S.C. § 774 (2012); and consumption of psychoactive drugs in religious ceremonies, 42 U.S.C. § 1996 (1978).

example, the Church Amendments to the Public Health Service Act—which passed unanimously in both houses of Congress, H.R. Rep. No. 227, 93d Cong., 2d Sess. (1973)—prohibited public authorities from discriminating against health workers who object to certain procedures for religious reasons, and from imposing upon such workers requirements that would be contrary to their religious beliefs. 42 U.S.C. § 300A-7(b)-(e). A further amendment to the Public Health Service Act in 1996 extended similar anti-discrimination protections to health care *entities*—not just individuals—that refuse to participate in abortion procedures. 42 U.S.C. § 238n(a).[3]

When it passes such laws, Congress is not in the habit of drawing fine distinctions among the various kinds of religious organizations. All religious organizations, including not only churches but also religious non-profits, are entitled to protection. Title

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[3] Additional examples include: protection for faith-based organizations seeking foreign assistance grant funds against being forced to support medical programs abroad that violate their religious beliefs, 22 U.S.C. § 7631(d)(1); an exception for health plans participating in the Federal Employees' Health Benefits Plan that object to contraceptive coverage, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 727(b), 125 Stat. 786, 936 (2011); a requirement that the District of Columbia provide religious and conscience protections in any District of Columbia contraceptive mandate, *id.* § 808, 125 Stat. 941; and an exception in both the Medicare and Medicaid programs to ensure that managed care organizations are not required to provide coverage for counseling or referral services if the organization has religious or moral objections, 42 U.S.C. §§ 1395w-22(j)(3)(B)(i) & 1396u-2(b)(3)(B)(i).

VII of the 1964 Civil Rights Act, for example, provides an exemption from its religious employment discrimination provisions to any "religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a). The Children's Health Act of 2000 requires local governments that receive federal funding for substance-abuse services to consider using "religious organizations" to provide those services on the same basis as all other nongovernmental organizations, and prohibits governments from discriminating "on the basis that the organization has a religious character." 42 U.S.C. § 300x-65(b)(2). The Health Programs Extension Act of 1973 provides that the receipt of certain federal grants, contracts, or loans "by any individual or entity" does not authorize the government to require that the individual or entity perform or assist any sterilization procedures or abortions, if those procedures are contrary to the individual's or entity's "religious beliefs or moral convictions." 42 U.S.C. § 300a-7(b). Similarly, the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as amended, states that an "organization, including a faith-based organization," cannot, as a condition of receiving assistance, be forced to participate in an AIDS-related program or activity "to which the organization has a religious or moral objection." 22 U.S.C. § 7631(d)(1)(B).

II. RFRA, Enacted with Overwhelming Bipartisan Support, Provides Broad Religious Liberty Protections.

While Congress has often identified and proactively addressed specific instances in which religious exercise may be burdened by generally applicable laws, Members of both parties have recognized that doing so in every instance is not practical. Conflicts between religious belief and federal enactments inevitably arise in unforeseen ways. To account for this possibility, Congress enacted RFRA.

RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can "demonstrate[] that [the] application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1 (a)-(b) (1993).

A. RFRA enjoyed broad interest group and bipartisan support.

RFRA enjoyed broad bipartisan support in both houses of Congress, a significant achievement for any major piece of legislation. The bill was introduced in the House by then-Representative Charles Schumer—a Democrat—and garnered 170 co-sponsors from both political parties. It was approved in committee by a unanimous 35-0 vote and was passed unanimously by the full House. H.R. Rep. No. 88, 103d Cong., 1st Sess. (1993). In the Senate,

the companion bill was jointly presented by Republican Senator Orrin Hatch and Democratic Senator Edward Kennedy. It attracted a bipartisan group of 58 co-sponsors, was approved in committee by a 15-1 vote, and passed the full Senate by a vote of 97-3. S. Rep. No. 111, 103d Cong., 1st Sess. (1993). Indeed, this coalition represented an

> extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole, a very broad coalition of groups that have traditionally defended the interests of the various religious faiths in our country, as well as those who champion the cause of civil liberties.

Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong., 2d Sess., at 13 (1990) (statement of Rep. Stephen Solarz, chief sponsor of H.R. 5377).[4]

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[4] Rep. Solarz introduced H.R. 5377 in 1990 and reintroduced the bill in 1991 as H.R. 2797. H.R. 2797 was vigorously debated in the House, particularly on whether RFRA could be used to access abortion services or abortion funding. The bill was reintroduced by Rep. Schumer in 1993 as H.R. 1308, which ultimately was enacted as 42 U.S.C. §2000bb. This brief cites to statements made during the debates on H.R. 5377 and 2797. The text of the two bills and the coalition of its supporters remained largely unchanged. *Compare* Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil & Constitutional Rights of the House (continued...)

RFRA also was supported by an exceptionally broad coalition of organizations, representing Christians, Jews, Muslims, Sikhs, and secular civil rights organizations. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210-11, n.9 (1994). They included the National Council of Churches, the National Association of Evangelicals, Americans United for Separation of Church and State, the United States Catholic Conference, the American Jewish Committee, the American Muslim Council, the Southern Baptist Convention, the Baptist Joint Committee, American Humanist Association, the Episcopal Church, the Christian Legal Society, the Church of Jesus Christ of Latter-day Saints, the American Civil Liberties Union, People for the American Way, Coalitions for America, Concerned Women for America, and the Home School Legal Defense Association. 139 Cong. Rec. 4922 (1993) (statement of Sen. Kennedy); *see also* Laycock & Thomas, *supra* at 210-211 n.9.

B. RFRA has an expansive reach.

In enacting RFRA, Congress took three major steps to ensure that its provisions applied expansively: (1) it applied RFRA's mandates to *all* Federal laws, including laws passed after RFRA's enactment; (2) it drafted the law so that it protects a

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Comm. on the Judiciary, 102d Cong., 2d Sess. (1992), *with* Religious Freedom Restoration Act of 1993, H. Rep. No. 88, 103d Cong. 1st Sess. (May 11, 1993) & Religious Freedom Restoration Act of 1992: Hearing Before the S. Judiciary Comm., 102d Cong., 2d Sess. (1992).

wide range of religious belief and activity; and (3) it ensured that the statute applied to a broad universe of individuals and entities. Each step ultimately won the support of all Democrats and Republicans in the House and virtually all Democrats and Republicans in the Senate.

1. RFRA applies to all Federal laws.

RFRA requires that courts apply its compelling interest standard broadly to "all Federal law, and the implementation of that law," 42 U.S.C. § 2000bb-3(a), unless the "law explicitly excludes such application by reference to" RFRA, *id.* § 2000bb-3(b). RFRA cuts "across all other federal statutes modifying their reach [—]a powerful current running through the entire landscape of the U.S. Code." Michael S. Paulsen, *A RFRA Runs through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253-54 (1995). RFRA is "both a rule of interpretation and an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place." Laycock & Thomas, 211.

RFRA's compelling interest standard therefore acts as a floor below which religious protection, including religious exemptions, may not fall. As such, RFRA's compelling interest standard applies regardless of whether the rule in question includes (or fails to include) specific religious exemptions. Should Congress or regulatory agencies adopt specific religious exemptions, such exemptions must be coextensive with or broader than RFRA. *See* 42 U.S.C. § 2000bb-1 ("Government shall not

substantially burden a person's exercise of religion" unless it can demonstrate that burden is imposed by "the least restrictive means of furthering [a] compelling governmental interest.").

Conversely, if Congress fails to include an explicit exemption or if an exemption fails to fully alleviate the burden for all affected persons, a burdened individual or entity may bring a claim and obtain relief under RFRA. In short, RFRA acts as a general principle with universal application to all Federal laws and regulations burdening the free exercise of religion, without exception. Tellingly, despite the fact that RFRA permits Congress to enact laws that are exempt from its application, 42 U.S.C. § 2000bb-3(b), Congress has not once chosen to do so. This deference to RFRA's broad scope evidences Congress's continued support for robust statutory protections of religious liberties.

2. RFRA protects a wide range of religious activity and belief.

In addition to the broad universe of laws subject to RFRA, the statute also protects a broad variety of sincerely held religious beliefs, regardless of the origin, content of, or rationale for, those beliefs. Congress defined "religious exercise" expansively, as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7) (defining "religious exercise" for purposes of RLUIPA and RFRA); *id.* § 2000bb-2(4) (incorporating § 2000cc-5's definition). Congress further directed that this provision "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the

terms of this chapter and the Constitution." *Id.* at § 2000cc-3(g).

RFRA's broad protections apply to *all* religious practices and tenets. The statute protects sincerely held religious beliefs, regardless of whether those beliefs are shared, accepted, or recognized by society. The lead sponsor of RFRA in the House warned of the consequences should "Congress succumb[ ] to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular." *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil & Constitutional Rights of House Comm. on the Judiciary,* 102d Cong., 2d Sess. 1, 124 (1992) (testimony of Rep. Solarz).

3. RFRA applies to a broad universe of entities.

RFRA also applies broadly to all individuals and entities. Nothing in the text of RFRA permits agencies to treat the sincere religious objections of one type of organization (such as a church or integrated auxiliary) differently than another (such as a religious non-profit). *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition" of the term "person," which "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.") (alteration in original). The statute

protects all persons and entities who harbor sincere religious beliefs equally; RFRA makes no distinctions based on tax status and imposes no sliding scale of religious protection.

Congress explicitly rejected attempts to distinguish among certain classes of individuals or entities. An amendment that would have exempted prisons from RFRA's requirements, and would thereby have stripped prisoners of the bill's religious liberty protections, for example, was offered in the Senate, debated extensively, and failed to pass. *See* 139 Cong. Rec. 26,910 (1993) (statement of Sen. Dianne Feinstein); *see also* 139 Cong. Rec. 9,682 (1993) (statement of Rep. Jack Brooks, then Chairman of the House Judiciary Committee, the committee with jurisdiction over the legislation).

Indeed, just two years ago, the Government itself suggested that RFRA protects churches and religious non-profits equally. In its brief in *Burwell* v. *Hobby Lobby Stores, Inc.*, the government juxtaposed for-profit corporations, which it argued were not entitled to religious liberty exemptions under RFRA, against "individuals *and religious non-profit institutions*," which it argued were the traditional holders of religious free exercise rights and the intended beneficiaries of RFRA. Gov't Br. at 18-19, *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354) (emphasis added). The Congress that enacted RFRA, the Government noted, "had at that time enacted [some] religion-based exemptions for employers , but those exemptions were all limited to churches *and other religious non-profit institutions*." *Id.* at 19-20 (emphasis added). The

Government recognized that the religious objections of these employers would burden some employees whose religion differs from that of their employer, but stated that "Congress viewed that burden as a cost that was justified to protect 'religious organizations['] interest in autonomy in ordering their internal affairs.'" *Id.* at 20 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 340-41 (1987) (Brennan, J., concurring in the judgment) (alterations in original)). "That understanding," the Government continued, "is consistent with the First Amendment's 'special solicitude to the rights of religious organizations.'" *Id.* (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012)).

The Government has therefore admitted that religious non-profit organizations are protected by RFRA. Any argument that RFRA permits second-tier protection for such organizations runs contrary to the statutory text, Congress's long history of protecting such organizations in parity with other religious organizations (especially when contraceptive services are involved), and the Government's own arguments before this Court a mere two years ago.

III. The Government's Supposed Religious "Accommodation" Violates RFRA.

The Government's supposed "accommodation" of petitioners' religious beliefs requires them to take an affirmative act—completing a form or sending a notice that includes names and contact information

of their insurance carriers or third party administrators—that will result in their chosen carriers providing their employees with free access to contraceptives and/or drugs that petitioners believe are abortifacients. Taking this affirmative act, petitioners sincerely believe, violates their religion. *Little Sisters of the Poor Home for the Aged, Denver, Colo, et al.* v. *Burwell*, 794 F.3d 1151, 1167-69 (10th Cir. 2015). If petitioners refuse, they face potentially crippling penalties. *Id.* at 1167 (estimating that a single Little Sisters home could incur penalties of up to $2.5 million per year, and that the trust could lose up to $130 million in plan contributions); *id.* at 1169 (stating that each petitioner university must either provide coverage or incur a penalty of $100 per employee per day).

Because the possibility of penalties imposes a substantial burden on a sincere religious belief, the Government must demonstrate that the regulations are the least restrictive means of pursuing a compelling state interest. 42 U.S.C. § 2000bb-1 (a)-(b). The Government's claim that it need not make this showing misconstrues RFRA's broad statutory text and the holdings of this Court that RFRA incorporated.

A. The Government's approach requires courts to weigh the verity of religious beliefs.

When Congress enacted RFRA, it incorporated long-standing precedents of this Court holding that courts may not weigh the validity of a person's religious beliefs or the "correctness" of a claimant's interpretation of religious doctrine. *See, e.g.*,

Thomas v. *Review Bd. of the Indiana Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981) (explaining that "it is not within the judicial function and judicial competence to inquire whether the petitioner correctly perceived the commands of [his] faith," and that where a claimant "dr[aws] a line, it is not for us to say that the line he drew was an unreasonable one"); *Frazee* v. *Illinois Emp't Sec. Dept.* 489 U.S. 829, 834 (1989) (rejecting the idea that "one must be responding to the commands of a particular religious organization to claim the protection of the Free Exercise Clause"); *United States* v. *Ballard*, 322 U.S. 78, 86 (1944) ("[W]e do not agree that the truth or verity of respondent's religious doctrines or beliefs should have been submitted to the jury."); *Callahan* v. *Woods*, 658 F.2d 679, 685 (9th Cir. 1981) ("In applying the Free Exercise Clause , courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs"). So long as an asserted religious belief is sincerely held, it may merit protection even if it is not "acceptable, logical, consistent, or comprehensible to others." *Thomas*, 450 U.S. at 714.

Incorporating these cases, RFRA protects *all* types of sincere religious conduct, and thus subjects all substantial burdens on that conduct to the courts' strict scrutiny. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2761 n. 3 (noting that RFRA not only "codified" the Court's "pre-*Smith* jurisprudence," which required that substantial burdens on religious exercise serve a compelling government interest, but also "provided even broader protection for religious liberty than was available under those decisions"); *see also Religious Freedom Restoration Act of 1991:*

Hearings on H.R. 2797 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess., at 138 (1992) (statement of Rep. Solarz) ("I don't think it should be the job of the Congress to pick and choose among which religious rights are legitimately a subject of presentation to the courts"); *id.* at 148 (statement of Rep. Gaffney) (concerned with the fact that "local governments often have little or no respect for sincere convictions at odds with the sensibilities or preferences of the majority.").

The Government, however, asks the Court to protect only *some* types of sincere religious activities—those it views as reasonable or correct. This mistake can be summarized in one thought, repeated often throughout the Tenth Circuit's opinion in *Little Sisters* below: "Although Plaintiffs allege the administrative tasks required to opt out of the [contraceptive] Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity." *Little Sisters of the Poor*, 794 F.3d at 1173-74. The Tenth Circuit therefore made its own independent determination of whether the Little Sisters of the Poor would be morally complicit under the supposed accommodation. But courts may not do this under RFRA. *See Thomas*, 450 U.S. at 715 ("[I]t is not for us to say that the line [drawn by the religious practitioner] was an unreasonable one").

Although the morality of the contraceptive mandate provides a motivating factor for petitioners' objections, petitioners have consistently claimed an independent religious objection to HHS's certification process itself. *See e.g.*, Br. of Appellants, at 18, *Little*

Sisters of the Poor v. *Sebelius*, 794 F.3d 1151 (10th Cir. 2014) (No. 13-1540) ("The Little Sisters believe that executing and delivering the form would make them morally complicit in sin, would contradict their public witness to the value of life, and would immorally run the risk of misleading others."). Whether taking the steps required by the supposed "accommodation" in fact makes petitioners morally complicit is therefore not for courts to determine. The petitioners sincerely believe they would be morally complicit if they take the actions HHS requires. As long as that belief is sincere—and the Government admits that it is—the Government may not second guess it. *Little Sisters of the Poor*, 799 F.3d at 1178 ("The Government does not dispute the sincerity of Plaintiffs' religious belief.").

The Government's argument that submitting the paperwork required by the supposed accommodation does not make petitioners morally complicit is therefore misguided. That argument attacks the underlying *facts* upon which a belief is based. Indeed, the Tenth Circuit opinion focuses significant energy on disputing the truth of petitioners' belief that the certification process "causes" or "triggers" contraceptive coverage. *Little Sisters of the Poor*, 794 F.3d at 1179-91. The implication of this argument is that despite being sincerely held, petitioners' religious beliefs need not be afforded deference because they are based on false premises. *Id.* at 1191 (holding that "RFRA does not require us to defer to their erroneous view about the operation of the ACA and its implementing regulations."). Taken to its extreme, the Government could rely on this logic to question *any*

religious belief. Could the Government ban a non-profit religious school from teaching creationism by disputing the underlying facts behind creationism? Could a court reviewing food regulations analyze the objections of a Kosher deli by questioning whether the deli owner's religious judgments regarding food content are well-grounded in the facts? RFRA and the case law on which it was based look to the *sincerity* with which a religious belief is held, not whether the religious believer is applying his or her own religion correctly. Any other approach would draw our courts into theological disputes that they are neither competent nor constitutionally authorized to resolve.

B. The Government misconstrues RFRA's use of the word "substantial."

Pursuant to RFRA, a burden on religious exercise is subject to the compelling interest inquiry only if such burden is "substantial." 42 U.S.C. § 2000bb–1. The Government appears to argue that when courts determine that the compelled conduct would not violate a religious principle, or that the religious principle at issue is only a minor or "insubstantial" one, the burden is not "substantial." For example, because the Tenth Circuit in *Little Sisters* determined that the accommodation does not make the religious organizations morally complicit, the court concluded that the petitioners are not being compelled to commit a "substantial" wrong. *See Little Sisters of the Poor*, 794 F.3d at 1181 (as to petitioners with insured plans), 1186 (as to petitioner Southern Nazarene University's self-insured plan), and 1188

(as to petitioner Little Sisters' self-insured church plans).

But courts have no business deciding which sins are "substantial" and which are "insubstantial." This Court has repeatedly explained that the word "substantial" as used in RFRA has nothing to do with the gravity of the supposed sin. Rather, in the context of compelled government action, a burden is substantial if the *pressure to act* is "substantial." Thus, this Court in *Thomas* (which RFRA incorporated) held that a substantial burden exists when a law places "substantial pressure"—including financial consequences—"on an adherent to modify his behavior and to violate his beliefs While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." 450 U.S. at 717-18.

The Tenth Circuit itself recognized that courts are only asked to determine "whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on a claimant to violate that belief." *Hobby Lobby* v. *Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013); *see also Little Sisters of the Poor*, 794 F.3d at 1177.

When an organization faces substantial penalties for refusing to engage in conduct it sincerely believes is wrong, its religious exercise is necessarily substantially burdened. In this case, this Court has already held that the fines under the ACA's contraceptive mandate "clearly impose[ ] a substantial burden" on sincerely held religious beliefs. *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2779. As such, the burden imposed by the Government, here the challenged accommodation

process, should be subject to RFRA's "compelling interest" standard.

IV. The Affordable Care Act Does Not Override RFRA.

RFRA, as explained above, applies to all federal statutes unless the "law explicitly excludes such application by reference to" RFRA, 42 U.S.C. § 2000bb-3(b). In more than two decades since RFRA's enactment, Congress has not disclaimed RFRA's application to any law. The ACA is no exception. Nothing in the ACA disclaims RFRA's application. The ACA and its regulations therefore cannot substantially burden religious exercise unless the Government can meet its high burden of demonstrating that "[the] application of the burden to the person" is the least restrictive means of pursuing a compelling state interest. 42 U.S.C. § 2000bb-1(a-b).

Indeed, when Congress could have anticipated that the ACA might conflict with an individual's or an organization's religious beliefs, Congress created specific exemptions to address the concern. Under the ACA, individuals who are members of religious sects that conscientiously oppose accepting the benefits of health insurance are not required to make the shared responsibility payment, 26 U.S.C. § 5000A(d)(2)(A), nor are individuals who are members of religiously-based "health care sharing ministries," 26 U.S.C. § 5000A(d)(2)(B). The Act also provides that it shall not "be construed to interfere with or abridge an elder's right to practice his or her religion through reliance on prayer alone for healing" when

the elder expresses this religious choice. 42 U.S.C. § 1397j-1(b). Congress also permitted exemptions in the context of abortion coverage. The ACA provides that nothing in the Act "shall be construed to require a qualified health plan to provide coverage of [abortion services for which public funding is either allowed or prohibited]," 42 U.S.C. § 18023(b)(1)(A)(i), and it specifies that health plans offered through government exchanges may not discriminate against health care providers or health care facilities because of their unwillingness to provide or pay for abortions, 42 U.S.C. § 18023(b)(4).

That the ACA does not include a specific accommodation for the petitioners here, however, does not indicate an intent to deny them an exemption. Again, RFRA's very purpose is to ensure that, if the Government cannot satisfy its high burden, broad exemptions are provided to protect religious liberty, whether or not protection is explicitly granted in the text of the law.

In this case, it is doubtful that Congress could have anticipated the particular infringements of religious liberty at issue because the ACA itself did not require employers to provide free contraceptives and abortifacients. Congress enacted only the broad, general language of the Women's Health Amendment, which requires coverage without cost sharing for, "with respect to women, such additional preventive care and screenings as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4). "Preventive care and screenings" would have been understood to refer to screenings

and treatment to protect against life-threatening diseases such as breast cancer, not the provision of contraceptives and abortifacients. For example, in her floor speech proposing the Women's Health Amendment, Senator Barbara Mikulski explained that it would "guarantee[] access to those critical preventive services for women to combat their No. 1 killers," which she identified as "breast cancer, cervical cancer, colorectal cancer, ovarian cancer, ... lung cancer, [and] heart and vascular disease." 155 Cong. Rec. 28,801 (2009).

V. In Adopting the Regulations At Issue Here, HHS Consistently Ignored the Requirements of RFRA.

It was the Health Resources and Services Administration—not Congress—that, pursuant to recommendations from the Institute of Medicine, interpreted "preventive care" as requiring coverage for the contraceptives at issue in this case. *See* HRSA, HHS, *Women's Preventive Services Guidelines*, *available at* http://www.hrsa.gov/womensguidelines/.[5] That recommendation was adopted by the Departments implementing this portion of the ACA. *See* 45 C.F.R. § 147.130(a)(1)(iv); 29 C.F.R. §

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[5] Members of Congress did seek to confirm that abortion would not be covered by the Women's Health provision. *See* 155 Cong. Rec. 29,308 (2009) (statement of Sen. Mikulski) ("This amendment does not cover abortion. Abortion has never been defined as a preventive service. . There is neither legislative intent nor legislative language that would cover abortion under this amendment, nor would abortion coverage be mandated in any way by the Secretary of Health and Human Services.").

2590.715-2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv).

In the course of implementing these regulations, HHS has paid little attention to the religious concerns of non-profit organizations. HHS's first set of regulations detailing the preventive care services for women required under the Act addressed only the religious concerns of churches and their integrated auxiliaries; it did not address at all the concerns of religious non-profit organizations, even though, as noted above, Congress and the courts have routinely treated the religious freedom claims of these entities similarly. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Only in response to comments on the narrowness of HHS's proposed definition of "religious employer" did it create a one-year safe harbor for religious non-profit organizations and begin to consider the appropriate way to address these organizations' religious concerns. *See* 77 Fed. Reg. 8,725, 8,727 (Feb. 15, 2012). Almost a year and a half later, it purported to resolve the issue by requiring religious non-profits to self-certify their objections to the contraceptive mandate by filling out a form and delivering it to their health insurance issuers, which would then be responsible for providing those same objectionable contraceptive services to the organizations' employees. 78 Fed. Reg. 39,870, 39,876 (July 2, 2013). This Court stepped in to enjoin HHS from enforcing this arrangement against religious non-profits in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014), pending final disposition on appellate review.

This hostility to religious non-profits is perhaps even more evident from HHS's failure to respond adequately to multiple requests from Congress that it examine the religious liberty implications of the contraceptive mandate. In October 2011, 28 Senators wrote to then-HHS Secretary Kathleen Sebelius, asking her to provide any analysis of constitutional or statutory religious liberty issues that the Department had requested or obtained in regard to the proposed mandate.[6] HHS provided no evidence of any legal analysis in response to this request.[7] *President's Fiscal Year 2013 Health Care Proposals: Hearing Before the S. Comm. on Finance*, 112th Cong., 2d Sess., at 10 (2012) (statement of Sen. Hatch). At a Senate Finance Committee hearing in February 2012, Secretary Sebelius was again asked whether her staff had performed or requested any legal analysis of these religious liberty issues; she responded, "Well, we certainly had our legal department look at a whole host of legal issues." *Id.* at 11. She was then asked whether she had requested such an analysis from the Justice Department, to which she responded, "I did not. No, sir." *Id.*

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[6] Letter from Senators Orrin Hatch, Mike Johanns, and 26 others to the Honorable Kathleen Sebelius, Secretary of Health and Human Services (October 5, 2011), *available at* http://www.hatch.senate.gov/public/index.cfm/2011/10/hatch-johanns-spearhead-letter-to-hhs-on-women-s-preventive-services-mandates.

[7] *See also* Letter from Jim R. Esquea, Assistant Secretary for Legislation, Department of Health and Human Services, to Senator Orrin G. Hatch (December 22, 2011).

Two months later, while testifying before the House Committee on Education and the Workforce, Secretary Sebelius could not identify the appropriate legal test for balancing religious concerns against the government's interest in providing preventative care services to women, and she admitted her unfamiliarity with the relevant case law. *Reviewing the President's Fiscal Year 2013 Budget Proposal for the U.S. Department of Health and Human Services: Hearing Before the H. Comm. on Education & the Workforce*, 112th Cong., 2d Sess., at 43-44 (2012) (statement of Rep. Trey Gowdy). When asked if she had relied on any legal memoranda to inform her analysis of the religious liberty issues raised by the contraceptive mandate, Secretary Sebelius responded that she had "relied on discussions." *Id.* at 45.

As a result of HHS's refusal to consider the requirements of RFRA, the Government is left to defend a regulation that requires it do something it has no business doing: assess the validity and correctness of the petitioners' religious beliefs.

CONCLUSION

For the foregoing reasons, the judgments of the Third, Fifth, Tenth, and District of Columbia Circuits should be reversed.

Respectfully submitted,

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